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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 116

STEWART W. NEWSOM,

Petitioner,

vs.

W. FRANK SMYTH, JR.,

Superintendent of Virginia State Penitentiary.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

BRIEF FOR PETITIONER

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INDEX

SUBJECT INDEX

	Page
BRIEF FOR PETITIONER:	
Opinions Below	1
Jurisdiction	1
Constitutional Provisions and Statutes Involved	2
Question Presented for Review	3
Statement of the Case	3
Argument	5
Conclusion	14
APPENDIX A	15.

CITATIONS

CASES:

Burns v. *Ohio* (1959), 360 U.S. 252, 3 L.ed. 2d 1209, 79 S.Ct. 1164	10, 11
Cash v. *Culver* (1959), 358 U.S. 633, 3 L.ed. 2d 557, 79 S.Ct. 432	8
Chessman v. *Teets* (1957), 354 U.S. 156, 1 L.ed. 2d 1253, 77 S.Ct. 1127	11, 12
Commonwealth v. *McCue* (1905), 103 Va. 870, 49 S.E. 623	7
Douglas v. *Green* (1960), 363 U.S. 192, 4 L.ed. 2d 1142, 80 S.Ct. 1048	11
Ellis v. *United States* (1958), 356 U.S. 674, 2 L.ed. 2d 1060, 78 S.Ct. 974	8
Eskridge v. *Washington State Board* (1958), 357 U.S. 214, 2 L.ed. 2d 1269, 78 S.Ct. 1061	10
Griffin v. *Illinois* (1956), 351 U.S. 12, 100 L.ed. 891, 76 S.Ct. 585	9, 10, 11, 13
Hendrix v. *Rhay* (1960), 156 Wash. 435, 353 P.2d 878	13
Holmes v. *United States* (C.A. 8th Cir. 1942), 126 F. 2d 431	13
Johnson v. *United States* (1957), 352 U.S. 565, 1 L.ed. 2d 593, 77 S.Ct. 550	8

Page

Moore v. *Michigan* (1957), 355 U.S. 155, 2 L.ed. 2d 167, 78 S.Ct. 191 8
Palmer v. *Ashe* (1951), 342 U.S. 134, 96 L.ed. 154, 72 S.Ct. 191 14
Parker v. *Ellis* (1960), 362 U.S. 574, 578, 4 L.ed. 2d 963, 967, 80 S.Ct. 909, 912, in Footnote 3 5
Pennsylvania v. *Claudy* (1956), 350 U.S. 116, 100 L.ed. 126, 76 S.Ct. 223 ..... 8, 14
People v. *Kalan* (1957), 2 N.Y. 2d 278, 140 N.E. 2d 357 14
Skeens v. *Commonwealth* (1951), 192 Va. 200, 64 S.E. 2d 764 5
State ex rel. Grecco v. *The Allen Circuit Court* (1958), 238 Ind. 571, 153 N.E. 2d 914 14
Sublett v. *Adams* (1960), 362 U.S. 143, 4 L.ed. 2d 612, 80 S.Ct. 527 8
United States v. *Ragen* (D.C.N.D. Ill. 1945), 60 F. Supp. 820 13
United States v. *Sevilla* (C.A. 2nd Cir. 1949), 174 F. 2d 879 13
Uveges v. *Pennsylvania* (1948), 335 U.S. 437, 93 L.ed. 127, 69 S.Ct. 184 ..... 8, 14
Watkins v. *Commonwealth* (1940), 174 Va. 518, 6 S.E. 2d 670 7
Wilde v. *Wyoming* (1960), 362 U.S. 607, 4 L.ed. 2d 985, 80 S.Ct. 900 8
Willey v. *Hudspeth* (1957), 162 Kan. 516, 178 P. 2d 246 14

STATUTES:

28 U.S.C. §1257(3) 1, 3
28 U.S.C. §2241(c)(3) 3
28 U.S.C. §2254 5
Code of Virginia of 1950, §8-462–8-502 6
Code of Virginia of 1950, §8-463 ..... 3, 4
Code of Virginia of 1950, §8-476 5
Code of Virginia of 1950, §14-181 ..... 3, 7
Code of Virginia of 1950, §19-167 ..... 3, 7
Code of Virginia of 1950, §19-214.1 ..... 3, 7
Code of Virginia of 1950, §19-262 ..... 3, 7

MISCELLANEOUS:

Page

Rules of Supreme Court of Appeals of Virginia:
Rule 5:1 (1) 5
Rule 5:1-Rule 5:14 6
Rule 5:4 4
55 A.L.R. 2d 1085 12

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BRIEF FOR PETITIONER

Opinions Below

No opinion was written by the Supreme Court of Appeals of Virginia. The order entered by that Court appears at R. 36. The judgment order entered by the Law and Equity Court of the City of Richmond appears at R. 22, and the memorandum opinion of that Court appears at R. 23-31.

Jurisdiction

Jurisdiction of this Court is invoked under the provisions of U.S.C. Title 28, §1257(3), the Petitioner claiming violation of a right guaranteed by the Due Process and Equal

Protection of the Law clauses of the Fourteenth Amendment of the United States Constitution.

The constitutional question was raised in the Petition for Writ of Habeas Corpus, in the brief in support thereof and in the exhibits attached thereto, all filed by the Petitioner in the Law and Equity Court of the City of Richmond, Virginia, on January 12, 1959 (R. 4, 6, 13, 14). The Judge of that Court, in his opinion and order entered June 3, 1959, expressly considered, ruled upon and denied the claim of the Petitioner (R. 22-31). The Supreme Court of Appeals of Virginia by final order entered October 13, 1959, did affirm the judgment of the lower court (R. 36). Petition for certiorari filed in this Court on November 3, 1959, together with motion for leave to proceed *in forma pauperis*, was granted by order entered May 31, 1960.

Constitutional Provisions and Statutes Involved

Strictly speaking the only constitutional or statutory provision indispensably involved in this case is §1 of the Fourteenth Amendment to the Constitution of the United States.

However, as it may be helpful in reminding the Court of the Federal and State constitutional and statutory background of the question now under consideration, several constitutional provisions and statutes are set out verbatim, *infra*, in Appendix A. They are cited here as follows:

1. Amendment V to the Constitution of the United States.
2. Amendment VI to the Constitution of the United States.
3. Amendment XIV, §1 to the Constitution of the United States.

4. Title 28 U.S.C. §1257(3).

5. Title 28 U.S.C. §2241(c)(3).

6. Section VIII, first paragraph of the Constitution of Virginia.

7. Section 8-463 of the Code of Virginia of 1950.

8. Section 14-181 of the Code of Virginia of 1950.

9. Section 19-167 of the Code of Virginia of 1950, as in effect in April 1953.

10. Section 19-214.1 of the Code of Virginia of 1950, as in effect in April 1953 (Acts of Assembly 1952, Ch. 348).

11. Section 19-262 of the Code of Virginia of 1950.

Question Presented for Review

Is an indigent, convicted in a State Court of a capital offense and sentenced to life imprisonment, entitled to counsel, upon request, for the purpose of appealing from his conviction?

Statement of the Case

On April 10, 1953, Petitioner was tried for murder in the first degree in the Hustings Court of the City of Richmond, Part II, Richmond, Virginia. He was convicted by a jury and his punishment was fixed at life imprisonment in the State Penitentiary (R. 11, 12). During the trial and after the trial through the time when exception was taken to the Court's ruling denying a motion to set aside the verdict, the Petitioner was represented by counsel of his own choosing. Immediately thereafter the services of trial counsel ceased. From then on Petitioner represented himself. He requested the Court for an opportunity to produce

within ten days additional evidence which his attorney had failed to introduce. This request was denied and the Petitioner was ordered confined to the Penitentiary for and during his natural life (R. 12).

Eight days later, on April 18, 1953, Petitioner wrote to the Trial Judge "noting an appeal", and stating that he would attempt to get counsel "to complete the appeal" (R. 13). Five days thereafter, on April 23, 1953, he wrote a second letter to the Trial Judge stating that he had been unable to engage an attorney to "complete" his appeal, and requesting that the Court appoint counsel to appeal his case to the highest Court of Virginia (R. 14). The Court failed to grant the request and did not appoint counsel for the Petitioner to carry out the appeal.

The Petitioner's "noting" of appeal and request for counsel on appeal came well within the four months period allowed for taking an appeal under the applicable statutes of the State and rules of the Supreme Court of Virginia. §8-463 of the Code of Virginia of 1950; Rule 5:4 of Rules of the Supreme Court of Appeals of Virginia. Moreover, although the Petitioner did not precisely say so in his letter of April 23, 1953, the Judge of the Law and Equity Court of the City of Richmond, Virginia, who first heard the Petition for Writ of Habeas Corpus in this case now before the Court recognized that the Petitioner was in fact indigent on April 23, 1953 (R. 18, 24, 25, 27).

On January 12, 1959, Petitioner filed his Petition for Writ of Habeas Corpus in the Law and Equity Court of the City of Richmond, Virginia, together with Affidavit of Poverty and Brief in Support of the Petition (R. 1-10). Honorable Robert Lewis Young, Judge of the Law and Equity Court, appointed counsel to argue the Petition (R. 20, 21), notified the Petitioner (R. 18) and after studious consideration rendered a memorandum opinion (R. 23-31)

and entered an order on June 3, 1959, denying the Petition (R. 22). In his opinion and order Judge Young passed directly upon the question here presented for review (R. 27). As stated above, Petition for Certiorari was granted by this Court on May 31, 1960, from final order entered October 13, 1959, by the Supreme Court of Appeals of Virginia affirming the judgment of Law and Equity Court of the City of Richmond (R. 36, 37).

In Virginia, the right of appeal is not absolute but is discretionary with the Court. §8-476 of the Code of Virginia of 1950. The rules governing appellate procedure include criminal as well as civil appeals. Rules of Supreme Court of Appeals of Virginia, Rule 5:1 §1. *Skeens* v. *Commonwealth* (1951), 192 Va. 200, 64 S.E. 2d 764.

Petitioner here has exhausted the remedies available in the Courts of Virginia pursuant to the requirements of Title 28 U.S.C. §2254.

ARGUMENT

The sole question involved in this case is simple. The arguments are succinct. The appointment of appellate counsel should be made in this case because:

1. Justice demands it.
2. The Fourteenth Amendment requires it.
3. The decisions of this Court support it.

1. It is elemental that a layman cannot "competently defend himself" [1] in the trial of a criminal case. His incompetency is just as obvious in the morass of appellate intricacies and technicalities.

[1] From the admission of the Assistant Attorney General of Texas quoted in *Parker* v. *Ellis* (1960), 362 U.S. 574, 578, 4 L.ed. 2d 963, 967, 80 S.Ct. 909, 912, in Footnote 3.

The necessity for the help of counsel in perfecting and prosecuting an appeal exists in all states of the United States in general, and in Virginia in particular. There are thirty-four technical sections in Title 8, Chapter 21 of the Virginia Code dealing with the subject of appeal. Sections 8-462 through 8-502. Fifteen pages, comprising approximately one-third of all, of the Rules of the Supreme Court of Appeals of Virginia are devoted to appellate proceedings. Rules of Supreme Court of Appeals of Virginia, Rule 5:1 through Rule 5:14. Like most statutes and rules, no matter how beneficial and how carefully drawn, these laws and rules have been interpreted by Court decisions practically countless in number. The Petitioner in this case, when he asked for counsel, was faced with this quagmire of statutes, rules and decisions.

Moreover, if the Petitioner had been assigned counsel when he made the request, his chances for successful review would have been good, for out of the 167 criminal cases in which appeals have been allowed by the Supreme Court of Appeals of Virginia since January 1, 1950, 96 of these cases have been reversed and 71 have been affirmed. The odds definitely favor criminal appeals competently handled. The Petitioner should have been permitted to take advantage of those odds.

2. Under the Fourteenth Amendment to the Constitution of the United States a State cannot abridge the privileges or immunities of citizens, cannot deprive any person of life, liberty or property without due process of law, and cannot deny to any person the equal protection of its laws. Perhaps as society develops in the years ahead, it will demand and obtain a broader interpretation of the privileges or immunities clause than the past has required. For the Petitioner's purposes, the due process and equal protection clauses shield him more than adequately.

The phrase "due process of law" has been known to the science of jurisprudence for many centuries. The words in the phrase are dead and have remained the same. Their meaning has grown and flowered according to the needs of the vital society in which they have thrived. In medieval days they may have referred to trial by ordeal. In the early years of modern history they assured the interest if not the protection of a trial judge. Today they guarantee the right of an accused to counsel. *Watkins* v. *Commonwealth* (1940), 174 Va. 518, 6 S.E. 2d 670.[2]

The right to trial counsel having been established through the due process clause, the right to appellate counsel is required to be recognized under the equal protection clause of the Fourteenth Amendment. It is true that states are not compelled to establish appellate procedures in their Courts. *Commonwealth* v. *McCue* (1905), 103 Va. 870, 49 S.E. 623. But once they are established they must be offered alike to all persons. There must be equal justice under law. Legal remedies must be made available without distinction between rich and poor.[3]

3. As long as twelve years ago a minority of this Court felt that in all criminal trials, State as well as Federal, where serious offenses were charged, the failure to offer counsel deprived the accused of rights under the Fourteenth Amendment. And the entire Court was of the opinion

[2] It is especially significant that the Virginia Supreme Court of Appeals in this decision held that the fundamental right to counsel in a criminal trial was guaranteed by the rather nebulous phrase in Section 8 of the Virginia Constitution that a man "shall not be deprived of life or liberty, except by the law of the land."

[3] There are several Virginia statutes providing for the appointment of counsel and the payment of counsel for poor persons in criminal trials in the Commonwealth; §14-181, 19-167 and 19-214.1 of the Code of Virginia of 1950; and one statute providing for the remission of the costs of printing the record in felony appeals; §19-262 of the Code of Virginia of 1950. See Appendix, *infra*.

that in capital cases, State and Federal, where proceedings without counsel were so apt to result in injustice as to be fundamentally unfair, the accused must have legal assistance whether he requested counsel or not. *Uveges* v. *Pennsylvania* (1948), 335 U.S. 437, 93 L.ed. 127, 69 S.Ct. 184.

Where a person convicted in a State Court has not waived the benefit of counsel and where circumstances show that his rights could not have been fairly protected without trial counsel, the Due Process clauses in the Fifth and Fourteenth Amendments to the Federal Constitution invalidate his conviction. *Pennsylvania* v. *Claudy* (1956), 350 U.S. 116, 100 L.ed. 126, 76 S.Ct. 223.

This decision has been reaffirmed in *Moore* v. *Michigan* (1957), 355 U.S. 155, 2 L.ed. 2d 167, 78 S.Ct. 191; *Cash* v. *Culver* (1959), 358 U.S. 633, 3 L.ed. 2d 557, 79 S.Ct. 432; *Sublett* v. *Adams* (1960), 362 U.S. 143, 4 L.ed. 2d 612, 80 S.Ct. 527, and *Wilde* v. *Wyoming* (1960), 362 U. S. 607, 4 L.ed. 2d 985, 80 S.Ct. 900.

It is true that in the above mentioned cases the rule of right to counsel is established for defendants in trial courts. However, this Court has made the further definite indication that the right to counsel should not terminate at the end of a trial but must continue through the intricacies of appeal. Certainly in the Federal Courts indigent convicts are entitled to the appointment of counsel on appeal. *Johnson* v. *United States* (1957), 352 U.S. 565, 1 L.ed. 2d 593, 77 S.Ct. 550. In that case the Court emphasized that an appellate court was obligated to assign counsel to the petitioner for prosecuting his application for leave to appeal *in forma pauperis*. *Ellis* v. *United States* (1958), 356 U.S. 674, 2 L.ed. 2d 1060, 78 S.Ct. 974 (right to counsel on application for leave to appeal *in forma pauperis*).

In regard to state criminal trials, a most significant advance was made in *Griffin* v. *Illinois* (1956), 351 U.S. 12, 100 L.ed. 891, 76 S.Ct. 585. In that case the indigent petitioners sought a certiorari because of the failure of a State Court to furnish them without cost a certified copy of the record including a transcript of the trial proceedings. The record was a condition precedent to appellate review in Illinois, where indigent defendants sentenced to death were provided free records, but all other criminal defendants were required to buy them. In vacating the judgment of the Supreme Court of Illinois and remanding the cause to that Court for further action, the majority of this Court determined that the due process and equal protection clauses of the Fourteenth Amendment prevented Illinois from granting appellate review to those able to pay for it and from denying appellate review to those unable to pay the cost. The majority of the Court rested their decision upon this relevant, just and forceful language:

> "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance. It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all.
>
> "... But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations. See Cole v.

Arkansas, 333 U.S. 196, 201, 92 L.ed. 644, 647, 68 S.Ct. 514; Dowd v. United States, 340 U.S. 206, 208, 95 L.ed. 215, 218, 71 S.Ct. 262, 19 A.L.R. 2d 784; Cochran v. Kansas, 316 U.S. 255, 257, 86 L.ed. 1453, 1454, 62 S.Ct. 1068; Frank v. Mangum, 237 U.S. 309, 327, 59 L.ed. 969, 980, 35 S.Ct. 582." (351 U.S. 18, 100 L.ed. 898, 899.)

In *Eskridge* v. *Washington State Board* (1958), 357 U.S. 214, 2 L.ed. 2d 1269, 78 S.Ct. 1061, this Court determined that *Griffin* v. *Illinois, supra*, was controlling. Consequently the Court held that the State of Washington had deprived the petitioner of a constitutional right guaranteed by the Fourteenth Amendment by denying him appellate review of his conviction merely because he could not afford to pay for the record of his trial.

The case of *Burns* v. *Ohio* (1959), 360 U.S. 252, 3 L.ed. 2d 1209, 79 S.Ct. 1164, involved a factual situation where an indigent defendant convicted of burglary and sentenced to life imprisonment was advised by the Clerk of the Supreme Court of Ohio that he must pay a filing fee before he could file a motion for leave to appeal in an Ohio Court. In vacating the judgment below and remanding the case to the Supreme Court of Ohio for further action the opinion of this Court clarified and reaffirmed the decision in *Griffin* v. *Illinois, supra*, in this language:

"Since Griffin proceeded upon the assumption that review in the Illinois Supreme Court was a matter of right, 351 U.S., at 13, Ohio seeks to distinguish Griffin on the further ground that leave to appeal to the Supreme Court of Ohio is a matter of discretion. But this argument misses the crucial significance of Griffin. In Ohio, a defendant who is not indigent may have the Supreme Court consider on the merits of his application for leave to appeal from a felony conviction. But as that Court has interpreted §1512 and its rules

of practice, an indigent defendant is denied that opportunity. There is no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants. Indigents must, therefore, have the same opportunities to invoke the discretion of the Supreme Court of Ohio.

"The State's action in this case in some ways is more final and disastrous from the defendant's point of view than was the Griffin situation. At least in Griffin, the defendant might have raised in the Supreme Court any claims that he had that were apparent on the bare record, though trial errors could not be raised. Here, the action of the State has completely barred the petitioner from obtaining any review at all in the Supreme Court of Ohio. The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law.

"What was said in Griffin, might well be said here: 'We are confident that the State will provide corrective rules to meet the problem which this case lays bare.' 351 U.S., at 20." (360 U.S. 257, 258, 3 L.ed. 2d 1213.)

A most recent reaffirmation of the *Griffin* case was the decision in *Douglas* v. *Green* (1960), 363 U.S. 192, 4 L.ed. 2d 1142, 80 S.Ct. 1048. In this case the Court held, in a *per curiam* opinion, that the indigent petitioner was deprived of his constitutional rights to the equal protection of the laws when the payment of docket fees was made a condition precedent to appellate remedy.

The decision in *Chessman* v. *Teets* (1957), 354 U.S. 156, 1 L.ed. 2d 1253, 77 S.Ct. 1127, extended, or perhaps more accurately elucidated, the *Griffin* doctrine. There this Court held that an *ex parte* settlement of a State Court record,

after trial, violated the petitioner's constitutional rights to procedural due process, stating:

> "We think the petitioner was entitled to be represented throughout those proceedings either in person or by counsel. . . . If California chose to deny petitioner's request to appear in those proceedings in propria persona, it then became incumbent on the State to appoint counsel for him." (354 U.S. 162, 1 L.ed. 2d 1258.)

Thus *Chessman* v. *Teets* recognized that the constitutional right to counsel continued after trial and into the appellate process. Just as the line of constitutional right to counsel should not be drawn between trial and appeal it cannot be drawn at any point between the commencement of appeal and the conclusion thereof. The meaningfulness of the *Griffin* decision, recognized in the *Chessman* case, is further acknowledged and stated by the Annotator in 55 A.L.R. 2d 1085, as follows:

> "The general rule established in Griffin v. Illinois . . . that an indigent convicted of crime is, as a matter of federal constitutional law, entitled to state aid in obtaining appellate review of trial errors where review of such errors is available to persons able to pay the attendant expenses, does not reach the question whether such an indigent is entitled to be furnished with counsel to prosecute his appeal. A clear solution to this question must await further development of the Griffin rule. But this comment may be made: the essence of the Supreme Court's ruling in the Griffin Case is that a person convicted of crime cannot be put at a substantial disadvantage with respect to appellate review of his conviction merely because he is poor. Surely a substantial disadvantage exists where an appellant, because lacking the money with which to employ counsel, is forced to appear pro se

> before the appellate court. Thus, the establishment of the rule that a state must, as a matter of federal constitutional law, provide indigents with the assistance of counsel to prosecute appeals in criminal cases would appear to be no more than a logical extension of the Griffin doctrine."

Indeed it is arguable that an indigent convict's right to appellate counsel is *within* rather than *beyond* the scope of the *Griffin* rule. The furnishing of a free record for appeal places a financial burden on the State. The furnishing of counsel for appeal does not involve this economic cost. Certainly it would be an empty gesture to give a litigant a vehicle in which to travel the tortuous road of appellate review but to withhold from him an operator able to drive the vehicle. An appellant without counsel is as helpless as one without a record.

The constitutional propriety of counsel for indigent appellants has been recognized by lower Federal courts. *Holmes* v. *United States* (C.A. 8th Cir. 1942), 126 F. 2d 431; *United States* v. *Scoilla* (C.A. 2nd Cir. 1949), 174 F. 2d 879; *United States* v. *Ragen* (D.C.N.D. Ill. 1945), 60 F. Supp. 820. State courts have also recognized that the refusal to assign counsel to indigent appellants may violate the constitutional guarantees of due process and equal protection. *Hendrix* v. *Rhay* (1960), 156 Wash. 435, 353 P. 2d 878, where the Court states:

> "It is not enough that we provide counsel at public expense at the trial level; the fundamental principle that every person accused of a crime shall have a fair and impartial trial requires that an indigent defendant also be represented by an attorney at the appellate level. If he is denied the services of an attorney at the post-conviction proceedings and the appellate stage, the constitutional right to appellate review is illusory" (p. 880).

See also *State ex rel. Grecco v. The Allen Circuit Court* (1958), 238 Ind. 571, 153 N.E. 2d 914 (accused entitled to counsel at every stage of proceedings under Indiana Constitution); *People v. Kalan* (1957), 2 N.Y. 2d 278, 140 N.E. 2d 357 (refusal to assign counsel upon request prevented effective use of the right to appeal in violation of the constitutional guarantees of due process and equal protection); *Willey v. Hudspeth* (1957), 162 Kan. 516, 178 P. 2d 246 (State criminal defendant protected by Fourteenth Amendment to Federal Constitution).

The essential and extraordinary nature of the indigent criminal's right to counsel, as recognized in Federal and State courts, is emphasized in three decisions of this Court holding that a petitioner is not barred from presenting a challenge to his conviction by the passage of seven, eight or even eighteen years. *Uveges v. Pennsylvania* (1948), 335 U.S. 437, 93 L.ed. 127, 69 S.Ct. 184; *Pennsylvania v. Claudy* (1956), 350 U.S. 116, 100 L.ed. 126, 76 S.Ct. 223; and *Palmer v. Ashe* (1951), 342 U.S. 134, 96 L.ed. 154, 72 S.Ct. 191.

Conclusion

For the foregoing reasons the judgment of the Supreme Court of Appeals of Virginia should be reversed and the case remanded to that Court with the suggestion that that Court or the Hustings Court of the City of Richmond, Part II, Richmond, Virginia, appoint counsel for the Petitioner to appeal his conviction and sentence of April 10, 1953, to the Supreme Court of Appeals of the Commonwealth.

Respectfully submitted,

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APPENDIX A

Constitutional Provisions and Statutes:

Federal

1. Amendment V to the Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Amendment VI to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

3. Amendment XIV to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. Title 28 U.S.C., § 1257 (3):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * * * *

By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

5. Title 28 U.S.C., § 2241 (c) (3):

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .

* * * * *

The writ of habeas corpus shall not extend to a prisoner unless—

* * * * *

He is in custody in violation of the Constitution or laws or treaties of the United States;

STATE

6. § 8, first paragraph, of the Constitution of Virginia:

That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favor, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty. He shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers; nor be compelled in any criminal proceeding to give evidence against himself, nor be put twice in jeopardy for the same offense.

7. § 8-463 of the Code of Virginia of 1950:

No petition shall be presented for an appeal from, or writ of error or supersedeas to, any final judgment, decree, or order, whether the Commonwealth be a party or not, (a) which shall have been rendered more than four months before the petition is presented, or (b), if it be an appeal from a final order, judgment or finding of the State Corporation Commission which shall have been rendered more than four months before the petition is presented, or (c), if it be an appeal from a final award of the Industrial Commission unless the petition be presented within the time provided by § 65-94, or (d), if it be an appeal from a final decree refusing a bill of review to a decree rendered more than four months prior thereto, unless the petition be presented within three months from the date of such decree.

8. § 14-181 of the Code of Virginia of 1950:

When a judge of the circuit court of a county or city or a corporation or hustings court of a city ap-

points an attorney to defend a poor person charged with an offense that may be punishable by death, or by confinement in the penitentiary for a period of more than ten years, he may direct that a sum of money not to exceed forty dollars shall be paid out by the Commonwealth to the attorney so appointed to defend such person as compensation for such defense, and when such person is charged with the commission of a felony other than those mentioned the court may in its discretion direct the payment of a sum not to exceed fifteen dollars payable as aforesaid. When such direction is entered upon the order book of the court, the Commonwealth shall provide for the payment out of its treasury of the sum of money so specified. If the defendant is convicted, the amount allowed by the court to the attorney appointed to defend him shall be taxed against the defendant as a part of the costs of the prosecution, and if collected, the same shall be paid to the Commonwealth.

9. § 19-167 of the Code of Virginia of 1950 as in effect in April, 1953:

One accused of a felony may plead not guilty and, with his consent after being advised by counsel (who shall be appointed for him by the court, in all cases when he has no counsel of his own choosing) and the concurrence of the attorney for the Commonwealth and of the court entered of record, he may waive a jury; in case of such waiver, or a plea of guilty, the court shall try the case.

10. § 19-214.1 of the Code of Virginia of 1950 as in effect in April, 1953 (Acts of Assembly 1952, Ch. 348):

In any case in which a person is charged with a felony and is not represented by counsel, the court,

before accepting the plea of such person, shall by order entered of record appoint an attorney at law to represent him.

11. § 19-262 of the Code of Virginia of 1950.

Sections 8-481, 8-482, 8-497.1, 8-499, 8-500 and 14-129 shall apply as well to criminal cases as to civil cases; provided, that in a felony case in the Supreme Court of Appeals, if the plaintiff in error file with the clerk of the Court an affidavit that he is unable to pay or secure to be paid the costs of printing the record in the case, together with a certificate of the judge of the trial court to the effect that he has investigated the matter and is of opinion that the plaintiff in error is unable to pay, or secure to be paid, such costs, the printing shall be done as if the costs had been paid and the clerk shall not be required to account for and pay the same into the State treasury; but if the costs be not paid or secured to be paid and upon the hearing of the case the judgment of the court below be wholly affirmed by the Supreme Court of Appeals the Court in affirming shall also give judgment in behalf of the Commonwealth against the plaintiff in error for the amount of the costs to be taxed by its clerk.